SABAH BANK BHD.

v.

BORNEO HOUSING MORTGAGE FINANCE BHD.

HIGH COURT BORNEO
SYED AHMAD IDID J
[ORIGINATING MOTION NO. K 10 OF 1991]
13 APRIL 1992

ARBITRATION: *Breach of relationship - Whether bank was negligent - Application to set aside or remit for reconsideration of the Award - Whether there was error of law and/or fact - Did arbitrator misconduct himself.*

EP (Emperor Properties, the developer in question) operated a current account at SB (Sabah Bank). SB granted to EP a bridging loan of RM550,000 which was later raised to RM750,000. As security for the bridging loan SB demanded *inter alia* a letter of undertaking from BHMF to channel all finance releases into EP's account with SB. The first bridging loan of RM550,000 was disbursed in four instalments. The additional bridging loan of RM200,000 was released in one lump sum. A total of eight purchasers were given end finance by BHMF and a total of RM1,392,900 was released through ten cheques. All these ten cheques amounting to RM1,392,900 had been credited into EP's current account and EP had withdrawn all the proceeds from the cheques without repaying any part of the bridging loans of RM750,000. Consequently, the registered charges remained and still remained unsatisfied.

BHMF's claim against SB was for delivery of the eight individual titles free from encumbrances, alternatively refund of the sum of RM1,392,900. The arbitrator appointed by both parties found that there was a *Hedley Byrne* relationship existing between BHMF and SB. He also found that SB was negligent for allowing EP to draw proceeds from the ten cheques from their account and utilise them for purposes other than discharging the bridging loan. SB applied to set aside or remit for reconsideration the Award on the grounds that there is an error of law and/or facts on the face of the Award and that the arbitrator has misconducted himself on the proceeding.

Held:

[1] There is a no evidence whatsoever to indicate in any way that the arbitrator had misconducted himself on the proceedings. He could not have deviated from the norms because both parties had their say, they submitted all sorts of documents, they talked at length and only at the end did the arbitrator consider the facts and the weight to be placed on each as well as the law and concluded as he did.

[2] Even on the normal customer-banker relationship, the bank (SB) would be liable to BHMF. More so by virtue of the special relationship between the two parties, EP and the purchasers, there arose a relationship as found by the learned arbitrator.

[Applicants' application dismissed with costs.]

Cases referred to:

Bulk Oil (ZUG) AG v. Sun International Ltd. (No. 2) [1984] 1 Lloyd's Rep 531 ***(cit)***

Mortin v. Burge [1836] 4 A & E 973 ***(cit)***

Syarikat Pemborong Pertanian Dan Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(cit)***

Ganda Edible Oils Sdn. Bhd. v. Transgrain BV [1987] CLJ (Rep) 95 ***(cit)***

Foley v. Hill [1848] 2 HL Cas 28 ***(cit)***
Joachimson v. Swiss Bank Corpn. [1921] 3 KB 110; [1921] All ER Rep 92 ***(cit)***
Re Hallett's Estate, Knatch Bull v. Hallett [1880] 13 Ch D 696 ***(cit)***
Banque Belge pour L'Etranger v. Hambrouck [1921] 1 KB 321 ***(cit)***
Fibrosa Spolka v. Alcyjna Fairbairn Lawson Combe Barbour Ltd. [1943] AC 32 ***(cit)***
Price v. Neal [1762] 3 Burr 1354 ***(cit)***
Brooks Wharf And Bull Wharf Ltd. v. Goodman Brothers [1937] 1 KB 534 ***(cit)***
Farley v. Turner [1857] 26 LJ Ch 710 ***(cit)***
Selangor United Rubber Estates Ltd. v. Craddock & Ors. (No. 3) [1968] 2 All ER 1073; [1968] 1 WLR 1555 ***(cit)***
Karak Rubber Co. Ltd. v. Burden & Ors. (No. 2) [1972] 1 All ER 1210 ***(cit)***
Selby v. Whitbread & Co. [1917] 1 KB 736 ***(cit)***
GKN Centrax Gears Ltd. v. Matbro Ltd. [1976] 1 Lloyd's Rep 555 ***(cit)***

Legislation referred to:
Arbitration Act 1952, s. 24(2)
Housing Developers (Control And Licensing) Act 1966, s. 7A

Other sources referred to:
Russel on Arbitration, 20th Edn., p. 396
Pagets' Law of Banking, pp. 172, 180

For the applicants - Ronny Cham; M/s. Ronny Cham & Co.
For the respondents - Simon Shim; M/s. Shim Fang & Co.

JUDGMENT

Syed Ahmad Idid J:

I heard on 30 January 1992, an originating motion by the applicants, Sabah Bank Berhad, to set aside or remit for reconsideration the Award made by Datuk George Seah, the learned arbitrator, in an arbitration between them and the respondents, Borneo Housing Mortgage Finance Berhad. The grounds of the application are set out in the originating motion and supported by one affidavit-in-support and another supplementary affidavit both of Mr. Chan Eng Beng affirmed on 28 June 1991 and 14 August 1991, respectively.

One material factor that I shall take into serious consideration is that the learned arbitrator was appointed by both parties when they voluntarily agreed to refer the initial dispute to arbitration and he met all concerned over several days (from 25 to 27 February 199l) followed by written submissions to elicit their evidence, information and date as well as discuss the legal principles.

The learned arbitrator summarised the facts as follows (at para. 4 of his Award):

(a) EP (Emperor Properties, the developer in question) operated a current account No. 4958 at SB (Sabah Bank).

(b) In 1983 SB granted to EP a bridging loan of RM550,000 subject to a number of terms and conditions which EP accepted. The amount of the bridging loan was raised to RM750,000 by the addition of another RM200,000 in the same year.

(c) As security for the bridging loan one of the conditions demanded by SB was a letter of undertaking from BHMF to channel all finance releases into EP's account with SB.

(d) SB also stipulated that the sum payable for the release of each individual title of the charged property would be RM75,000 and this subsequently increased to RM145,000 per title when the bridging loan was raised RM750,000.

(e) A third party charge of NT. 213141836 was executed by the registered co-owners, Suning bin Ah Kan, Rosalie Sitayun and Binsin bin Masu to secure the bridging loans.

(f) A joint and several guarantee was also signed by the directors of EP. *viz*: Khoo Puay Chew, Han Hon Kong and Chua Heng Lim.

(g) The first bridging loan of RM550,000 was disbursed in four instalments from 4 April 1983 to 2 June 1983. The additional bridging loan of RM200,000 was released in one lump sum.

(h) A total of eight purchasers were given end financing by BHMF and a total of RM1,392,900 was released through ten cheques from 25 October 1983 to 14 July 1984.

(i) All these ten cheques amounting RM1,392,900 had been credited into EP's current account No. 4958 and EP had withdrawn all the proceeds from the cheques without repaying any part of the bridging loans of RM750,000. Consequently, the registered charges remained and still remained unsatisfied.

I am of the opinion that facts being facts, they remain where they are but the assessment of the facts can bring differing conclusions and because of this, the respondents had sought the following relief:

(a) That SB do deliver up eight individual titles known as CL. 215337198, 215337205, 215337214, 215337223, 215337232, 215337241, 215337250 and 215337269 to BHMF, free from encumbrances.

(b) Alternatively, SB do refund the sum of RM1,392,900 to BHMF, together with interest at the rate of 13% per annum from the date of breach to date of realisation;

(c) damages;

(d) such further and other relief as this Tribunal deems fit.

The findings, by the arbitrator, which both Counsel also included in their submissions, are that:

(i) He was satisfied that a Hedley Byrne relationship existed between BHMF and SB for these reasons:

(a) there was a representation given by someone professing expertise like SB here (AB1-2):

(b) The representation was required for a purpose, *viz:* to channel all finance releases from BHMF into EP's current account No. 4958 with SB so that they would be appropriate towards repayment of the bridging loans owing by EP to SB;

(c) SB knew that the representation would be communicated to BHMF to be used for that purpose (Exh. C10):

(d) BHMF relied on the representation: and

(e) BHMF acted on the representation and gave the letter of undertaking which was subsequently delivered and received by SB (Exh. C12).

As a result of this Hedley Byrne relationship SB owed to BHMF a legal duty to exercise proper care to channel all cheques released by BHMF into EP's current account No. 4958 and to utilise the proceeds from the cheques to discharge the bridging loans owing by EP to SB. When this happened it would follow that the registered charges would be discharged and EP would be in a position to deliver individual titles to BHMF, free from encumbrances.

In breach of their duties to BHMF SB permitted EP to draw from EP's current account No. 4958 all the proceeds from the cheques amounting to RM1,392,900 and diverted them for purposes other than repayment of the bridging loans for which they were intended.

As a result, the bridging loans of RM750,000 remained unpaid, the registered charges stayed undischarged and BHMF had suffered substantial losses.

The arbitrator found that SB were negligent for allowing EP to draw the proceeds from the ten cheques from their current account No. 4958 and utilise them for purposes other than discharging the bridging loans. He also found that SB had failed to satisfy him that SB had not been negligent in discharge of their duties to BHMF as bankers.

The arbitrator then awarded damages in the sum of RM1,392,900 to BHMF.

The originating motion (or application) is based on two grounds:

(a) that the Award was bad due to an **error of law and/or facts on the facts of the award**; and

(b) that the learned Arbitrator has **misconducted himself on the proceedings**.

(emphasis added)

Mr. Ronny Cham, of Counsel for the applicants, submitted that the true issue of the dispute on this case must be relating to the question of redemption of charged properties between the applicants and the respondents, as bridging financier and end-financier of the project. He added that the question for the arbitrator was to decide whether there was an agreement or contract between the end-financier and the bridging financier to the effect that in consideration of the end-financier paying the redemption sum on the properties the bridging financier will release or discharge the charge against the said properties.

Did the learned arbitrator misconduct himself? An accurate statement of the legal position in relation to misconduct was delivered by Bingham J in *Bulk Oil (ZUG) AG v. Sun International Ltd. (No. 2)* [1984] 1 Lloyds Rep. 531 at p. 533:

> 'Misconduct' is an unfortunate term of art used to denote procedural unfairness, almost always involving no reflection on the competence or integrity of the arbitrator. As already noted, it is not misconduct to err in fact or law. It is not misconduct to make findings for which there is no evidence (*Oleificio Zucchi v. Northern Sales Sup*. at p. 521) although an appeal may lie if the decision is such as no reasonable arbitrator, properly directed, could have reached on the facts found.

From the outset I will say that the second ground for the applicant is misconceived in that there is no evidence whatsoever to indicate in any way that the arbitrator had misconducted himself on the proceedings. He could not have deviated from the norms because both parties had their say, they submitted all sorts of documents, they talked at length and only at the end did the arbitrator consider the facts and the weight to be placed on each as well as the law and concluded as he did. While no doubt s. 24(2) of the Arbitration Act 1952, clearly spells out the parameters outside which the arbitrator is not permitted to go on a frolic of his own, para. 622 of the *Halsbury's Laws of England* states:

> ... misconduct occurs for example:
>
> (1) if the arbitrator or umpire fails to decide all the matters which were referred to him.
>
> ...
>
> (3) if the award is inconsistent, or is uncertain or ambiguous...

I am able to say that the learned arbitrator had taken pains to examine the facts and he explained how he decided the matters referred to him. (See *Mortin v. Burge* [1836] 4 A & E 973).

But on the first ground, that the award was bad due to an error of law and/or facts on the face of the award, there were some doubts regarding the liability of the applicants in respect of the current account. I shall deal more fully on this.

As often times happens in Court cases, the two parties are at odds. Mr. Ronny Cham said that the learned arbitrator had made a grievous error in the inference of the fact from the evidence and had seriously mixed up the difference between an end-finance and a bridging finance. On the other hand, Mr. Simon Shim, of Counsel for the respondents, stated that "the arbitrator's analysis of the facts adduced before him was commendable".

Mr. Ronny Cham's rather detailed arguments on this ground was impressive. I accept that in the case of *Syarikat Pemborong Pertanian Dan Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210, it was held that "the Court could review the award if there was error apparent on the face of the award" per Raja Azlan Shah J (as His majesty then was). It was further held in the said case that " ...it is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material, from the case in which a specific question of law has been referred to him... In the former case the Court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one". The said decision was affirmed in the Supreme Court case of *Ganda Edible Oils Sdn. Bhd. v. Transgrain B.V.* [1987] CLJ (Rep) 95 at p. 100.

Mr. Cham contested that the representation in the instant case was "to channel all finance releases from BHMF into EP's current account No. 4958 with SB so that they would be appropriated towards repayment of the bridging loans owing by EP to SB". According to Mr. Cham, the arbitrator had erroneously construed the said term by adding the words In Capitals of his own to the so-called "representation".

Since such strong reliance had been placed on the letter of undertaking (Exh. C-12), that letter is now reproduced here (see page 156 of the affidavit-in-support):

> 2 June 1983
> Emperor Properties Sdn. Bhd.
> (Address)
>
> Dear Sirs
>
> End Finance For Oriental Villa Phase II Kota Kinabalu
>
> Thank you for your letter EP/83/10/LKL of 6 May 1983 and we are pleased to confirm herewith that releases against the six loan accounts of our clients related to the above estate will be paid into your account with Sabah Bank Berhad, Kota Kinabalu Account No. 4958.
>
> Yours faithfully
>
> sgd:
> Branch Manager
>
> cc: The Manager
> Sabah Bank Berhad.

On this Mr. Cham strenuously argued that the learned arbitrator had made a grievous error in the inference of fact from the evidence by deciding that the said letter of undertaking (Ex. C12) was indeed a letter of undertaking by the respondents to "channel all finance releases to EP's account". The letter merely informed the developer that only six loans will be released to the account at that material time. Mr. Cham further claimed that through this question was not specifically pleaded in the pleading it is crucial in the inference of the fact on the part of the learned arbitrator when deciding whether there was a letter of undertaking, to consider the actual content of the letter. In this instant case, it was merely a letter addressed to Emperor Properties confirming that six loans will be channelled to their account with the applicants. Mr. Cham argued that it was improper to say that this fulfils the requirement of "channelling All End-Finance Releases". In fact, in other part 5 of the Award and in the statement of cause of action of the respondents it was clear that the action was not in respect of all the 10 units of the housing accommodation, neither was it about 6 units, nor was there any indication as to which eight lots belonged to which eight purchasers. Such are the inconsistencies and uncertainties of the inference of fact. Thus, the applicants submitted that the learned Arbitrator made a wrong inference of fact from the evidence.

(i) Perhaps it is useful to reproduce here Exhibit C17:

> The Manager
> Sabah Bank Berhad
> Kota Kinabalu
>
> Tuan/Puan
>
> Oriental Villa, PH. II, Kota Kinabalu
>
> We have pleasure in enclosing herewith our cheque No. 371138 for RM540,700 being payment in your favour for credit of Emperor Properties Sdn. Bhd., Kota Kinabalu.
>
> Kindly acknowledge receipt.
>
> Yang benar
>
> sgd:

(ii) Under para. 13.1 of the Award, the arbitrator made the following finding of fact:

> It is not disputed that acting on the terms of the letter of undertaking (Exh. C12) BHMF released altogether ten cheques totalling RM1,392,900 from 25 October 1983 to 14 July 1984 (Exh. C153-187). All these cheques were collected by EP from the office of BHMF and credited into EP's current account No. 4958 with SB. Since I have already held that "account" refers to EP's current account No. 4958 at SB learned Counsel for the claimant's therefore submits that all the requirements laid down by SB in their letter AB1-2 had been fully complied with by BHMF.

On all the evidence, the only question which I have to ask myself is the relationship between the parties *vis-a-vis* the Emperor Properties Sdn. Bhd.'s current account at the applicant's branch. It is trite law that a current account creates positions of debtor and creditor between the banker and customer. See *Foley v. Hill* [1848] 2 HL Cas 28. Later an agreement of such relationship was implied in *Joachimson v. Swiss Bank corpn.* [1921] 3 KB 110 CA/[1921] All ER Rep. 92. The banker is free to use the money as his own. As a consequence the banker is not as a general rule concerned to inquire into the sources whence his customer derived the money or to pay head to the claims of third parties seeking to reach it in his hands as being by right theirs (See *Pagets Law Of Banking* at p. 172). And so did the respondents

have any control over it? They did not. Then can the applicant control it? On the face the answer is No.

Then the rule in *Hallett's* case (See *Re-Hallett's Estate, Knatch Bull v. Hallett* [1880] 13 Ch D 696) was introduced. Atkin LJ said in *Banque Belge pour l'Etranger v. Hambrouck* [1921] 1 KB 321 at p. 333:

> The case of In *Re - Hallett's Estate* makes it plain that the Court will investigate a banking account into which another person's money has been wrongfully paid, and will impute all drawings out of the account in the first instance to the wrongdoer's own monies, leaving the plaintiff's money intact so far as it remains in the account at all.

I am inclined towards *Paget's Laws of Banking* at p. 180 where it is submitted:

> That until the banker has notice he cannot in any event be put upon inquiry and may deal with the account in the ordinary way; he may put upon notice where the original way: he may be put upon notice where the original seller asserts that part of the buyer's balance consists of moneys in which the seller has an interest.

Unfortunately there is no more money remaining in EP's current account with SB (the applicants). Can we allow such a situation to excuse wrongdoing? Lord Wright, in the House of Lords in *Fibrosa Spolka v. Alcyjna Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32 said:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money or some benefit derived from another which it is against conscience that he should keep.

In the United States, in 1901 Chief Justice Holmes said that the ground for recovery for a payment under a mistake of fact is that the existence of the fact supposed was the conventional basis or tacit condition of the transaction, and the Court applied the rule in *Price v. Neal* [1762] 3 Burr. 1354. yet it was put generally in *Brooks Wharf And Bull Wharf Ltd. v. Goodman Brothers* [1937] 1 KB 534 per Lord Wright MR at 545 CA:

> The obligation (to repay) is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties of privity of contract

Money paid into a current account to meet a particular bill or cheque must be applied accordingly. *Farley v. Turner* [1857] 26 LJ Ch 710.

A banker may be a constructive trustee of money in his customer's account and in breach of that trust if he pays the money away, even on the customer's mandate, in circumstances which put him upon inquiry. *Selangor United Rubber Estates Ltd. v. Craddock & Ors.* (No. 3) [1968] 2 All ER 1073/[1968] 1 WLR 1555. *Craddock's* case held that the bank were also liable to the plaintiff in contract for failure to exercise reasonable care and skill in paying the cheque without making inquiry as to the purpose for which the money was being applied. See also Held (i)(b) in *Karak Rubber Co. Ltd. v. Burden & Ors.* (No. 2) [1972] 1 All ER 1210.

Even on the normal customer-banker relationship, the bank (SB) would be liable to BHMF. More so by virtue of the special relationship between the two parties, the Emperor Properties Sdn. Bhd. and the purchasers, there arose a relationship as found by the learned arbitrator at paras. 5.2 and 5.4:

5.2 There, the House of Lords, after reviewing the earlier cases, held that *if a person such as a banker, upon receiving a request for information or advice in circumstances that show that his skill or judgment is being relied upon. gives that information or advice without a disclaimer or responsibility, he accepts a legal duty to exercise proper care in doing so even though he is not under any contractual or fiduciary obligation to the inquirer, and if he is negligent an action for damages will lie.* at p. 528 Lord Delvin said:

> I think, therefore that there is ample authority to justify Your Lordships in saying that *the categories of special relationships, which may give rise to a duty to take care in word as well as in deed, are not limited to contractual relationships, but include also relationships which, in the words of Lord Shaw in Nocton v. Lord Ashburton are "equivalent to contract", that is where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.*

5.4 *In the general law of negligence the Hedley Byrne decision is of major importance. Establishing for the first time there can be liability for financial loss resulting from negligent words (as contrasted with physical injury resulting from negligent actions) even when the parties have no contractual or fiduciary relationship.* Earlier decisions reviewed in the judgments of Hedley Byrne included cases in which plaintiffs had succeeded by suing in contract and asserting that there had been some kind of consideration. *The House of Lords in Hedley Byrne case held that the same result can and should be achieved by the application of the law of negligence and that it is unnecessary and undesirable to construct an artificial consideration* - per Lord Delvin at p. 528.

Surely both parties can accept that when the purchaser's loans were disbursed by BHMF through cheques sent to ISB (or applicants here), there was the tacit understanding that such monies were towards the purchase of the houses. Unfortunately, at the time this transaction took place or when the claim arose, such understanding was not statutory. See now s. 7A, Housing Developers (Control and Licensing) Act, 1966. The "project account" ruling has been enforced in West Malaysia but has met some reservations from Sabah developers. The aim of the ruling is to prevent developers from abusing funds meant for implementing the project.

The arbitrator's finding at paras. 12.10 and 12.13 are apt:

> 12.10 It is common ground that the true owners of these ten cheques were EP and that the form of mandate used was not ordinary ones. If SB had taken the elementary banking practice when EP presented these cheques to the bank, SB should make the basic inquiry from EP about these cheques. And if SB had done so they would have discovered the truth that these cheques represented end financing from BHMF which SB had instructed to be channelled into EP's account with SB to be appropriated towards repayment of the bridging loans of RM750,000 and redemption of the registered charges at the rate of RM75,000 and this sum was later increased to RM145,000 per individual title so that EP could deliver individual titles, free from encumbrances to BHMF.
>
> 12.13 In my view, whether or not SB could prevent EP from operating current account No. 4958 in 1983 and 1984 was not the main issue in this proceeding; the issue was whether SB was negligent in allowing EP to withdraw all the proceeds of RM1,392,900 and diverting them towards payment of other unrelated purposes instead of utilising them to discharge the bridging loans of RM750,000 and redemption of the registered charges.

To all these, Mr. Ronny Cham said: "I submit, with due respect to the learned arbitrator, it is too far fetched to say that in the absence of any agreement regarding redemption of charged properties, such more payment of money into a current account of a client of the bank such as the applicants, the applicants need to ensure that the clients should only use their moneys standing in their credit in a particular way as the bank should dictate."

With respect to that, I am inclined towards what Sankey LJ in *Lloyds Bank v. Chartered Bank Of India, Australia & China* at p. 69 had said:

> In my view, a bank cannot be held to be liable for negligence merely because they have not subjected an account to a microscopic examination. It is not be expected that the officials of banks should also be amateur detectives. It is not easy, nor is it desirable, to define the degree of negligence which would render them liable. Many factors have to be taken into consideration, the customer, the account, and the surrounding circumstances. But, whilst it is difficult to draw the line, the problem upon which side of the line a particular case falls does not present such difficulties...

Mr. Shim urged the Court to support the Award rather than destroy it (per McCardie J in *Selby v. Whitbread & Co.* [1917] 1 KB 736 at p. 748: But then, by *Russel On Arbitration*, 20th Edn., at p. 396. "The Court has a general discretion to remit an award to the reconsideration of the arbitrator or umpire. This discretion is in general exercisable upon substantially the same grounds as will justify the setting aside of an award.

I cannot let this decision go without citing Lord Denning MR in *GKN Centrax Gears Ltd. v. Matbro Ltd.* [1976] 1 Lloyds Rep. 555 at p. 575:

> The weight of evidence and the inferences from it are essentially matters for the arbitrator. I do not think that the awards of arbitrators should be challenged or upset on the ground that there was not sufficient evidence or that it was too tenuous and the like. One of the very reasons for going to arbitration is to get rid of technical rules of evidence and so forth.

On the facts as found, on reading the Award of the learned arbitrator and on the principles of law, I dismiss the application with costs.

I should add a rider in that if I hold that the applicants (SB) are not liable to pay damages to the respondents (BHMF) the next stage would be for the borrowers of BHMF to claim against BHMF for the return of their monies which BHMF had sent to SB with the sole intention of discharging the bridging loans to enable the borrowers (who are also the purchaser) to discharge the charges and receive the individual titles. There would then be several suits against BHMF whose only fault, it seems to me, was to pay their customers' money to SB on reliance of SB's representation.

Also found at [1992] 3 CLJ 1640